

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

LAURELHURST COMMUNITY CLUB,)	
FRIENDS OF BROOKLYN, RAVENNA-)	Case No. 03-3-0016
BRYANT COMMUNITY ASSOCIATION,)	
UNIVERSITY DISTRICT COMMUNITY)	<i>(Laurelhurst II)</i>
COUNCIL, UNIVERSITY PARK)	
COMMUNITY CLUB, SEATTLE)	
DISPLACEMENT COALITION,)	
HAWTHORNE HILLS COMMUNITY)	FINAL DECISION AND ORDER
COUNCIL and NORTHEAST DISTRICT)	
COUNCIL,)	
)	
Petitioners,)	
)	
v.)	
)	
CITY OF SEATTLE, a municipal)	
corporation; UNIVERSITY OF)	
WASHINGTON,)	
)	
Respondents.)	
)	

I. SYNOPSIS

In September of 2003, eight community organizations¹ filed a Petition for Review with the Board alleging that the City of Seattle's adoption of Ordinance No.121193 violated Growth Management Act goals and requirements relative to public notice, public participation, and internal plan consistency. Ordinance No. 121193 removes the "lease lid" provisions of the 1998 Agreement between the City and University. In addition, these eight Petitioners alleged that the University of Washington did not meet the GMA requirement that state agencies comply with the provisions of local government plans.

The Board rejected the City's and University's argument that the 1998 City-University Agreement, which is codified into Seattle Municipal Code at 23.69.006(B) including its lease-lid provisions, are not development regulations subject to the goals and requirements of the GMA. The Board concluded that the challenged Ordinance No. 121193 fails to comply with the GMA's public notice and public participation

¹ The eight organizations are the Laurelhurst Community Club, Friends of Brooklyn, Ravenna-Bryant Community Association, University District Community Club, University Park Community Club, Seattle Displacement Coalition, Hawthorne Hills Community Council and Northeast District Council

requirements. Because of this finding, the Board did not reach the question of whether the amendments created by the Ordinance would create an internal inconsistency with other provisions of the Seattle Plan. The Board likewise did not reach the question of whether or not the University, a state agency, had failed to comply with the Seattle Plan.

The Board has remanded Ordinance No. 121193 to the City and directed that legislative action be taken to bring it into compliance with the goals and requirements of the Growth Management Act by no later than August 30, 2004.

II. PROCEDURAL HISTORY

On September 5, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Laurelhurst Community Club, Friends of Brooklyn, Ravenna-Bryant Community Association, University District Community Club, University Park Community Club, Seattle Displacement Coalition, Hawthorne Hills Community Council and Northeast District Council (collectively **Laurelhurst**.) Petitioners challenge the adoption by the City of Seattle's (the **City** or **Seattle**) adoption of Ordinance No. 121193 and actions taken by the University of Washington (the **UW** or **University**) in approving and executing the First Amendment to the 1988 Agreement between the City and the University. PFR, at 4.

On September 16, 2003, the Board issued the Notice of Hearing.

On October 3, 2003, the Board received "Supplement to Petition for Review."

On October 6, 2003, the Board received from the City a "Notice of Filing Index to the Record" (the **City's Index**). On this same date, the Board also received from the University a "Notice of Filing Index to the Record" (the **University's Index**).

The Board conducted a prehearing conference in this matter on October 23, 2003 in the Training Room on the 24th floor of the Bank of California Building, 900 Fourth Avenue in Seattle. Present for the Board were members Edward G. McGuire and Joseph W. Tovar, presiding officer. The parties were represented as follows: Jane Kiker for Petitioners; Terese Neu Richmond and T. Ryan Durkan for the University and Bob Tobin for the City. Also present were Michelle Isaacson and Steve Roos.

On September 16, 2003, the Board issued the "Prehearing Order" (the **PHO**) in this matter.

On November 14, 2003, the Board received "Petitioners' Motion to Supplement the Record and Memorandum in Support" attached to which were forty-three proposed supplemental exhibits. On this same date, the Board received from the City and the University "Respondents' Motion to Dismiss Petition for Review" (the **City/UW Motion to Dismiss**) attached to which were Exhibits A through E.

On November 21, 2003, the Board received "Petitioners' Response to City of Seattle's and University of Washington's Motion to Dismiss" (the **Petitioners' Response to**

Motion to Dismiss) attached to which was the “Declaration of Jeannie Hale in Support of Petitioners’ Response to City of Seattle’s and University of Washington’s Motion to Dismiss” (the **Hale Declaration**). On this same date, the Board received “The City/UW Response to Petitioners’ Motion to Supplement the Record.”

On November 26, 2003, the Board received “Petitioners’ Reply on Motion to Supplement the Record” attached to which was a letter dated April 10, 2003 from Matthew Fox to the Seattle City Council (the **April 10, 2003 Fox letter**) and a copy of an email dated July 9, 2002 from Diane Sugimura to Stephanie Haines. On this same date, the Board received “Respondents’ Reply to Petitioners’ Response to Motion to Dismiss to Dismiss Petition for Review” (the **City/UW Reply to Petitioners’ Response**).

On December 5, 2003, the Board issued “Order on Motions” (the **Order on Motions**) which admitted forty-one of the Petitioners’ proposed supplemental exhibits and provided for the City/UW to submit proposed rebuttal exhibits with their prehearing response briefs. The Order on Motions also deferred until the FDO any action on the City/UW Motion to Dismiss.

On December 9, 2003, the Board received from Petitioners a “Request for Reconsideration/Modification” of the Order on Motions (the **Petitioners’ Request**).

On December 15, 2003, the Board received “Respondents’ Response to Petitioners’ Request for Reconsideration/Modification”

On December 16, 2003, the Board received “Reply on Petitioners’ Request for Reconsideration/Modification.” Later this same date, the Board issued “Order on Reconsideration/Modification and Order Establishing Location for Hearing on the Merits” which denied the Petitioners’ Request.

On December 24, 2003, the Board received “Petitioners’ Prehearing Brief” (the **Petitioners’ PHB**).

On January 9, 2004, the Board received the “Respondents City of Seattle’s and University of Washington’s Prehearing Brief” (the **City/UW Response**) together with “Motion to Supplement the Record and Motion to Strike Hale Declaration” (the **City/UW Motion to Supplement and Strike**) attached to which were seventeen proposed supplemental exhibits, including the “Declaration of Theresa Doherty” (the **Doherty Declaration**).

On January 14, 2004, the Board received “Petitioners’ Response and Objections to the City/University’s Motion to Supplement the Record and to Strike the Hale Declaration” (**Petitioners’ Response to Motion to Supplement and Strike**) attached to which was a copy of the Hale Declaration.

On January 16, 2004, the Board received “Petitioners’ Reply Brief” (the **Reply**).

The Board conducted the Hearing on the Merits in this matter from 10:00 a.m. to 2:45 p.m. on January 21, 2004 in the building conference room on the 5th floor of the Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Present for the Board were members Bruce C. Laing, Edward G. McGuire and Joseph W. Tovar, presiding officer. Also present were the Board's legal externs Ketil Freeman and Lara Heisler. Representing Petitioners were Peter Eglick and Jane Kiker. Representing the City was Robert Tobin. Representing the University were T. Ryan Durkhan, Stephen Roos and Terese Neu Richmond. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. No witnesses testified. After the hearing, a transcript of the Hearing on the Merits (the **Transcript**) was ordered.

II. FINDINGS OF FACT

A. Facts regarding the 1998 Agreement

1. The 1998 Agreement was signed by University of Washington President Richard L. McCormick on May 28, 1998 and Mayor Paul Schell on June 1, 1998. PFR, [unnumbered] Attachment 11.
2. "Recital" Number 5 of the 1998 Agreement provides in part: "This Agreement is to define certain areas wherein the University, in its planning and development, may fulfill its mission in such a way as to continue to enhance the positive impacts upon the City as a whole and particularly upon the surrounding communities, and at the same time minimize any adverse impact it may have by working cooperatively with appropriate City agencies and community groups . . . The City and University should endeavor to plan and develop in a manner which contributes to the quality of the University environment, complements the mission of the University and minimizes any adverse impacts." *Id.*
3. Section II.E. of the 1998 Agreement provides in part:

Land Acquisition and Leasing

1. Policy. The current Land Acquisition and Leasing policy, found in Appendix B to the Master Plan for 1991 and 2001 . . . shall continue to apply except as specifically provided in this Agreement. In its next Master Plan, the University may propose changes to the Land Acquisition and Leasing policy in the GPDP [General Physical Development Plan] or in this Agreement, consistent with the process set forth in the adopted neighborhood plans, except that in the next Master Plan, when it is initially adopted, the amount of leased space in the Primary and Secondary Impact Zones shall be limited to 550,000 gross square feet and the boundaries of the permitted leasing zone shall not be changed. To the extent this Section II.E. conflicts with the Master Plan for 1991-2001, this section will prevail.

....

4. **Permitted Leasing.** Notwithstanding any provision of the General Physical Development Plan for 1991-2001 and Conditions of Approval, the University is permitted to lease property within the Primary and Secondary Impact Zones depicted in Exhibit A, so long as such use complies with City land use regulations, as follows: . . . b. The amount of leased space within the Primary and Secondary Impact Zones shall not exceed 550,000 gross square feet (gsf). This space limit shall not be reduced by construction under the GPDP.

Id.

B. Facts regarding incorporation of the 1998 Agreement into the Seattle Municipal Code

4. The 1998 Agreement between the City and the University of Washington was codified on December 17, 2001 as SMC 23.69.006. Ordinance No. 120691, Section 22, amending 23.69.006.
5. The City land use and zoning code (Seattle Municipal Code – **SMC**) is a GMA document, adopted pursuant to the GMA. “WHEREAS, the Council has determined that (various land use policies of the City) should be integrated with the Comprehensive Plan and development regulations to avoid multiple policy documents, and to implement the Growth Management Act as interpreted by the Growth Management Hearings Board; and . . .” *Id.*

C. Facts regarding the First Amendment

6. The Seattle City Council adopted Ordinance No. 121193 (a/k/a the **First Amendment**) on June 16, 2003. PFR, Attachment 1.
7. Section 22 of Ordinance No. 120691 amended subsection B of SMC 23.69.006, to include text regarding the University of Washington and the 1998 Agreement. This section was amended to read:

A. All land located within the Major Institution Overlay District shall be subject to the regulations and requirements of the underlying zone unless specifically modified by this chapter or an adopted master plan. In the event of irreconcilable differences between the provisions of this chapter and the underlying zoning regulations, the provisions of this chapter shall apply.

B. For the University of Washington, notwithstanding subsection A of this section above, the 1998 agreement between The City of Seattle and the University of Washington, or its successor, shall govern relations between the City and the University of Washington, the master plan process (formulation, approval and amendment), uses on campus, uses outside the campus boundaries, off-campus land acquisition and leasing, membership

responsibilities of CUCAC [City-University-Community Advisory Committee], transportation policies, coordinated traffic planning for special events, permit acquisition and conditioning, relationship of current and future master plans to the agreement, zoning and environmental review authority, resolution of disputes, and amendment or termination of the agreement itself. Within the Major Institution Overlay (MIO) Boundaries for the University of Washington, development standards of the underlying zoning may be modified by an adopted master plan, or by an amendment or replacement of the 1998 agreement between the City of Seattle and University of Washington.

Id.

8. The caption of Ordinance No. 121193 reads “AN ORDINANCE NO. authorizing the execution of the First Amendment to the 1998 Agreement Between the City of Seattle and the University of Washington to revise land acquisition and leasing provisions of that Agreement.” *Id.*

9. Section III of Ordinance No. 121193 provides in part:

Replacement of Section II.E. The parties intend that the limitations on leasing and acquisitions in Section II.E. of the City-University Agreement be changed to allow the University of Washington to use leased and acquired property consistent with the Seattle Land Use Code, subject to certain limitations. The parties hereby agree that the City-University Agreement be amended by replacing Section II.E., Land Acquisition and Leasing, in its entirety, with a new Section II.E. as set forth below:

E. Property Acquisition and Leasing

1. Policy.

a. Acquisition Policy. The Acquisition Policy is as follows: The University may purchase property within the City of Seattle. University use and development of acquired property in the City of Seattle must conform to the City of Seattle’s use and development regulations.

b. Leasing Policy. . . . the University of Washington may lease any property within the City of Seattle, subject to the following: . . .

Id.

10. The First Amendment was signed by University President Lee Huntsman and Mayor Greg Nickels on September 2, 2003. PFR, [unnumbered] Attachment 1, Exhibit 1.

III. STANDARD OF REVIEW/BURDEN OF PROOF/DEFERENCE

A. Board Review of Local Government Decisions

Petitioners challenge the City's adoption of Ordinance No. 121193 alleging that it does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance No. 121193, is presumed valid upon adoption by the City. Petitioner Laurelhurst bears the **burden of proof** of overcoming the City's **presumption of validity** by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the **"clearly erroneous" standard of review**. The Board "shall find compliance unless it determines that the actions taken by [a city or county] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the City in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.'" *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In 2002, the Supreme Court affirmed the Court of Appeals decision in *Cooper Point. Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be "qualified by experience or training in matters pertaining to land use planning." The Board has been endowed by the

legislature with quasi-judicial functions due to its expertise in land use planning.² Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency's interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Id.

IV. CITY/UW MOTION TO SUPPLEMENT AND STRIKE

The City/UW Motion to Supplement and Strike has two portions. The first is the request to supplement the record with rebuttal evidence. City/UW Motion to Supplement and Strike, at 1-3. The second is a request that the Board strike the Hale Declaration. City/UW Motion to Supplement and Strike, at 3-4. The Board organizes its discussion of this motion into these two pieces.

A. Motion to Supplement the Record with Rebuttal Evidence

The City/UW offer a total of seventeen³ proposed Supplemental Exhibits. City/UW Motion to Supplement and Strike, at 2-3. At the Hearing on the Merits, the Respondents stated that most of the seventeen offered rebuttal exhibits were not actually proposed supplemental evidence, but rather items that had been inadvertently omitted from the index.⁴ Upon questioning by the Board, the City and University acknowledged that proposed C/UW Supp. Ex. 17 (the Doherty Declaration) post-dated the adoption date of Ordinance No. 121193 by over six months⁵ and that proposed C/UW Supp. Ex. 1 (the Mayor's newsletter) bears no date of publication nor description of how or to whom it was distributed.⁶

The Board concludes that proposed Supp. Exhibits 2 through 16 were properly identified as index exhibits because they were dated prior to the adoption date of Ordinance No. 121193 and, by their terms, addressed the general topic of the lease lid and growth and

² The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board's website at www.gmh.b.wa.gov/central/index.html.

³ The seventeen exhibits were labeled as C/UW Supp. 1 through C/UW Supp. 17. A complete list of the proposed C/UW Supplement exhibits, and their disposition relative to the record before the Board, are attached is Appendix A.

⁴ Counsel for the City stated "I wouldn't say these are rebuttal documents per se as it indicates, but the documents should have been included in the index in the first instance." Transcript, at 9-10. Counsel for the University stated ". . . as we came down to briefing [these] really were in the nature of notice documents that should have been in the index to begin with." Transcript, at 11. Emphases added.

⁵ Transcript, at 18.

⁶ Transcript, at 32.

development issues in and around the University. However, the Doherty Declaration (C/UW Supp. 17) post-dated the June 16, 2003 adoption date of the Ordinance No., and the Mayor's newsletter (C/UW Supp. 1) is silent as to its date of issuance. Therefore, these exhibits could only be placed before the Board by means of the motion to supplement.

Regarding the request that the Board supplement the record with C/UW Exhibits 1 and 17, the Board notes that the City/UW have presented no argument responsive either to (1) the criteria of WAC 242-02-540 or (2) the Board's direction set forth in the Order on Reconsideration/Modification and Order Establishing Location for Hearing on the Merits, at 2, lines 15-17. The portion of the City/UW Motion to Supplement the Record that requests the Board to admit the C/UW Exhibit 1 (the Mayor's newsletter) and C/UW Exhibit 17 (the Doherty Declaration), is **denied**.

After the presiding officer ruled that the fifteen exhibits discussed, *supra*, were improperly omitted from the Index, the Petitioners then requested the Board to reconsider two items that it had previously rejected as supplemental exhibits, on the theory that those items also should have been included in the Index. Transcript, at 33. A review of the two proposed Petitioner Supplemental Exhibits that the Board denied in the Order on Motions shows that one pre-dated and the other post-dated June 16, 2003. Because proposed Supplemental Exhibit LCC 41, a June 26, 2003 email from Council Member Richard Conlin, post dates the Ordinance No.'s adoption date, it is not properly part of an amended index. However, because proposed Supplemental Exhibit LCC 42, a June 3, 2003 email from Council member Nick Licata, preceded the adoption date of Ordinance No. 121193, the Board rules that it should properly have been included in an amended Index. Laurelhurst proposed Exhibit LCC 42 is considered Index Ex. No. LCC 42. In so ruling, the Board attaches no particular weight or meaning to that exhibit, nor to any of the City/UW's additional index exhibits listed in Appendix A.

B. Motion to Strike the Hale Declaration

Because the Board determines, *infra*, that the Petitioners have participation standing, it does not address the question of Petitioners' standing under RCW 34.05. The Board therefore declines to rule on the portion of the City/UW Motion to Supplement and Strike that goes to the Hale Declaration.

VI. CITY/UW MOTION TO DISMISS

The City and the UW seek to dismiss the Laurelhurst PFR based on two grounds. First, the Respondents argue that the Board lacks subject matter jurisdiction. City/UW Motion to Dismiss, at 4-9. Second, the Respondents argue that the Petitioners lack standing. City/UW Motion to Dismiss, at 9-12. A review of the law, the arguments of the parties, and the Board's analysis is grouped into these two categories.

A. SUBJECT MATTER JURISDICTION

1. Applicable Law

RCW 36.70A.280 provides in relevant part:

(1) A growth management hearings board shall hear and determine only those petitioners alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or . . .

RCW 36.70A.030(7) provides:

"Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

2. Discussion

Positions of the Parties

1. City/UW

The City/UW argue that the City's action to lift the UW lease lid (*i.e.*, the First Amendment wrought by the adoption of Ordinance No. 121193) is merely an amendment to a two-party "contract," apart and distinct from the City's GMA development regulations. Respondents contend: "Contrary to Petitioners' assertions, the amendment of contractual provisions regarding leasing and acquisition is not an amendment of a 'development regulation.'" City/UW Motion to Dismiss, at 4. Citing the GMA definition of development regulation, the Respondents argue that the First Amendment concerns "ownership and leasing" rather than "use and development." City/UW Motion to Dismiss, at 5. With respect to acquisition, they argue:

The modified Acquisition Policy does not amend in any way how property in the City can be used or developed. It simply confirms that the University no longer has a policy of limiting its future land acquisition to a

particular geographical area, and can acquire property like any other landowner or institution. It makes no change at all to zoning designations, development standards, design guidelines, or any of the other types of restrictions or controls on property use and development identified in the GMA's definition of "development regulation."

City/UW Motion to Dismiss, at 6.

Respondents make a similar argument with respect to leasing. *Id.* They further argue that because the First Amendment was accomplished through the mutual agreement of the City and the University, it was not "placed by the City" and therefore does not meet the second required component of a development regulation. City/UW Motion to Dismiss, at 7. They also contend that, while the City has police power authority to regulate land use, they lack authority to regulate ownership. *Id.*

The City/UW contend that the reference to the 1998 Agreement in the SMC does not make the First Amendment a development regulation. City/UW Motion to Dismiss, at 8. They state:

Some of these issues [named in SMC 23.69.006(B)] may concern land use and development, but many clearly do not. Consequently, the 1998 Agreement contains numerous provisions that do not function as a development regulation. For example, Section IV of the 1998 Agreement describes how the City and University will address the problems of special events. Section VIII contains the parties' legal disclaimers regarding the effect of the 1998 Agreement . . . none of these provisions operate as a development regulation.

Id.

Respondents argue "the Board's general characterization of the 1998 Agreement in *Laurelhurst I* is not dispositive" and urge the Board to apply a "functional analysis" rather than a "categorical label." City/UW Reply to Petitioners' Response, at 2-3. Respondents contend that the pertinent question before the Board is "whether a particular provision consists of generally applicable development regulations that are subsequently applied to site development plans or project permit applications." *Id.* They argue:

In short, the test is not whether the action affects the University's (or any person's) ability to use given property, as the Petitioners claim, but rather whether the action entails the adoption, amendment or repeal of generally applicable development regulations that are applied to the regulatory review of site development plans or project permit applications. For the reasons described above, the leasing provisions of the Agreement challenged here do not meet that definition, and are therefore not development regulations under RCW 36.70A.020(7).

City/UW Reply to Petitioners' Response, at 5.

The essence of the City/UW argument regarding subject matter jurisdiction was summarized at the Hearing on the Merits in the form of three questions.⁷ They contend that a “provision” constitutes a GMA development regulation *only* when three questions can be answered in the affirmative: (1) does the provision control development or land use activities? (2) is the provision “placed on” by a City or County? and (3) is the provision generally applicable (area-wide)? With respect to the “lease lid” created by the 1998 Agreement and removed by the First Amendment, the City answers all three in the negative.

2. Laurelhurst

Petitioners argue that both the 1998 Agreement and the First Amendment are development regulations, regardless of how the City and University characterize them. Petitioners argue:

Respondents’ Motion to Dismiss is based on a single assertion that directly contradicts conclusions made by this Board in the *Laurelhurst I* appeal concerning the 1998 City-University Agreement . . . [T]he Board has already held that the terms of the 1998 City-University Agreement were part of the City’s “GMA development regulations that “govern the land use approvals for major institutions, including the University. The City and University, which were parties to *Laurelhurst I* and happy to accept its benefits, are bound by its conclusions here.

Petitioners’ Response to Motion to Supplement and Strike, at 7. Emphasis in original, citations omitted.

Petitioners argue that the above-cited Board conclusions in *Laurelhurst I* are supported by the GMA definition of “development regulations.” They assert:

The leasing and acquisition policies plainly regulate University “development,” in light of the way that term is defined in the City’s Major Institution Code:

The establishment of any new Major Institution use or the expansion of an existing Major Institution use, the relocation of an existing Major Institution use for a period of at least one (1) year, or the vacation of street for such uses.

SMC 23.69.007. The leasing and acquisition restrictions in the 1998 Agreement regulate University “land use activities” in that they constitute an official control on land use and development . . . [A] University of Washington major use is regulated – precluded – on a particular site if the University can neither acquire nor lease the property. This is precisely what the lease lid did.

Petitioners’ Response to Motion to Supplement and Strike, at 9. Emphasis in original.

⁷ Transcript, at 42-43.

Petitioners also argue that, when viewed in context of the City's other land use policy and regulatory ordinances, it is apparent that the First Amendment and 1998 Agreement are development regulations. They rely on the Board's reasoning in *Laurelhurst I*:

In making the determination of whether a local action is subject to the GMA generally and Board jurisdiction specifically, it is important to focus on the substance and policy context of that action, rather than the procedure employed or the label attached . . . That determination must be made after reviewing many facts and factors.

Petitioners' Response to Motion to Supplement and Strike, at 10, citing *Laurelhurst I*, CPSGMHB Case No. 03-3-0008, Order on Motions (Jun. 18, 2003), at 11-12.

Petitioners state that the City/UW position that leasing restrictions are not development regulations is undercut by the fact that Seattle "regulates large portions of the City based on no other criteria than the institutions' ownership and control of the subject property." *Id.* Petitioners explain that an "institutional use" is only regulated under the City's Major Institution Code if it is undertaken by one of 13 entities (including the UW) that has been designated a "Major Institution" by the City.⁸ Petitioners' Response to Motion to Supplement and Strike, at 11.

Petitioners further argue:

The City cannot disclaim its own Major Institution Code, an integral part of the Land Use Code, by claiming it is not a development regulation subject to review by this Board. These Major Institution regulations are based on Major Institution control of property within the city limits – the same premise which the respondents attack here as unprecedented. In short, respondents' arguments are belied by the City's own code.

Petitioners' Response to Motion to Supplement and Strike, at 13.

Petitioners also dispute the City/UW argument that, even if the 1998 Agreement is found to be a development regulation, the leasing and acquisition restrictions (*i.e.*, the 550,000 square foot "lid") are not. *Laurelhurst* points out that these policies have the actual and intended effect of limiting impacts, including transportation impacts, from University land use and development activity in the primary and secondary impact zones. Petitioners' Response to Motion to Supplement and Strike, at 15-16.

Lastly, *Laurelhurst* rejects Respondents' argument that the leasing and acquisition restrictions of the 1998 Agreement constitute an illegal "restraint on alienation." First, Petitioners point out that the meaning of "restraint on alienation" applies only to property

⁸ Seattle's educational and medical institutions qualify as "Major Institutions" if they have a minimum site size of 60,000 square feet of which 50,000 must be contiguous, and have a minimum gross floor area of 300,000 square feet. SMC 23.84.025.

conveyance or transfer of title⁹ and argue that nothing in the 1998 Agreement restricts the ability of the University to sell or lease its property to others. Petitioners' Response to Motion to Supplement and Strike, at 16. Second, Petitioners argue that, as a government entity, the University is not entitled to raise a due process objection of state restrictions such as the leasing and acquisition provisions of the 1998 Agreement. *Id.*

Analysis

The Board has previously concluded that the 1998 City University Agreement is a GMA development regulation. In *Laurelhurst I*¹⁰ the Board discussed the 1998 Agreement in terms of setting parameters for review and approval of a development permit – “The Board agrees with the City/UW that the UWCMP is not a subarea plan within the meaning of RCW 36.70A.080. Rather, the UWCMP is part of a permit application process resulting from a development regulation [*i.e.*, the 1998 Agreement as incorporated into SMC 23.69.006].” Therefore, the 1998 Agreement falls within the GMA’s definition of development regulations [RCW 36.70A.030(7)] as being the functional equivalent to a planned unit development ordinance or binding site plan ordinance, which governs the permit application process. As explained, *infra*, the Board has heard no new facts or arguments in the present case that alter this conclusion in *Laurelhurst I*.

First, the 1998 Agreement is *specifically* incorporated by reference into Seattle’s Municipal Code as SMC 23.69.006(B) – one of Seattle’s development regulations for major institutions. Second, the heading of the SMC section where reference is made to the 1998 Agreement is “Application of *regulations*.” SMC 23.69.006, (emphasis added).¹¹ These actions support the Board’s conclusion that the City clearly has made the 1998 Agreement a development regulation since the City has adopted it in its *entirety* into its code.

Additionally, by its own terms, the Agreement states that it is to *govern* a number of things. That language states “for the University of Washington . . . the 1998 [A]greement . . . shall ***govern*** relations between the City and the University, the master plan process, . . . uses on campus, uses outside the campus boundaries, off-campus land acquisition and leasing, membership responsibilities of the CUCAC. . . .” Finding of Fact 7 (emphasis added). Thus, the 1998 Agreement is a broad document that governs not just “relations between the City and University” but many other things, including some provisions that *control* the use of land and some that do not. The Board concludes that the word

⁹ Petitioners cite dictionary meanings of these terms. “Restraint on alienation” means “restriction of the power of alienating property;” to “alien property” means to “convey or transfer title to the property.” Petitioners’ Response to Motion to Supplement and Strike, at 16, quoting Black’s Law Dictionary (Rev. 4th ed.).

¹⁰ *Laurelhurst, et al., v. City of Seattle [University of Washington – Intervenor]*, CPSGMHB Case No. 03-3-0008, Order on Motions, (Jun. 18, 2003), at 11

¹¹ The use of the term “regulations” in SMC 23.69.006 cannot be taken to mean some regulation other than a GMA regulation. The City’s definition of “regulation” provides: “Development regulations. See RCW 36.70A.030.” SMC 23.84.008.

governs,¹² used in the 1998 Agreement, has a meaning that is synonymous with the meaning of the word *controls*¹³ in the GMA definition of regulation.¹⁴ Because the 1998 Amendment, by its explicit terms is intended to “govern . . . uses on campus, uses outside the campus boundaries, off-campus land acquisition and leasing . . .” the Board further concludes that it “*controls* . . . land use activities,” per RCW 36.70A.030(7). Thus, the 1998 Agreement, codified at SMC 23.69.006(B), clearly has the effect of being a local land use regulation, subject to the goals and requirements of the GMA.¹⁵ The fact that the City has codified all aspects of the 1998 Agreement in SMC 23.69.006(B) means that it intends for the Agreement to control land use activities involving the University.

Do the “off-campus land acquisition and leasing” provisions of the 1998 Agreement, as codified in SMC 23.69.006(B), control “land use activities?” The Board answers in the affirmative. It is apparent from the record, indeed from the Agreement itself, that the City sought to “minimize any adverse impact” of the University’s “land use activities,” both on campus and off campus, on surrounding communities. Finding of Fact 2. The rationale for a specific quantified limitation of off-campus space (*i.e.*, the 550,000 gsf lease lid) was, among other things, to minimize transportation impacts in the Primary and Secondary Impact Areas. In addition, the Board notes that Respondents argue that transportation impacts will actually lessen, not increase, if the lease lid is lifted. Transcript, at 132. The fact that Respondents make this argument, and the SEPA documentation cited in its support, reveals that the City sees a distinction between University (off-campus) land use activity in the Primary and Secondary Impact zones and non-University land use activity in those areas. The choice to include off-campus “land acquisition and leasing” provisions within the agreement, and then codify them as development regulations in the City code, is well within the City’s discretion. Thus, the 1998 Agreement, as codified in SMC 23.69.006(B), does control a “land use activity” namely, the University’s acquisition and leasing of off-campus floor area.

The Board cannot agree with Respondents’ contention that the regulatory effect of the Agreement was not “placed on” by the City, simply because the Agreement was originally signed by both the City and the University in 1998. This argument would have more potency if the City had not, in fact, adopted Ordinance No. 120691 in 2001. Finding of Fact 4. There is nothing in the 1998 Agreement, nor elsewhere in the record before the Board, that indicates that the City was compelled to take the legislative action

¹² Black’s Law Dictionary, Sixth Edition defines “Govern”, *vb.* - to direct and **control** the actions or conduct of, either by established laws or by arbitrary will; to direct and **control**, rule or **regulate**, by authority. To be a rule, precedent, law or deciding principle for.

¹³ Black’s Law Dictionary, Sixth Edition defines “Control(s)”, *n.* - Power or authority to manage, direct, superintend, restrict, **regulate**, **govern**, administer, oversee. The ability to exercise a restraining or directing influence over something.

¹⁴ “Development regulations” or “regulation” means the **controls** placed on development or land use activities by a county or city. RCW 36.70A.030(7). Emphasis added.

¹⁵ The use of the term “regulations” in SMC 23.69.006 cannot be taken to mean some regulation other than a GMA regulation. The City’s definition of “regulation” provides: “Development regulations. See RCW 36.70A.030.” SMC 23.84.008.

of adopting Ordinance No. 120691.¹⁶ Thus, Seattle did unilaterally “place on” the University the regulatory effect of SMC 23.69.006.

The Board is also unmoved by Seattle’s argument that the First Amendment is not a development regulation amendment because it does not have general application in an area-wide context. To the contrary, the adoption of Ordinance No. 120691 applied the provisions of the 1998 Agreement to a very large area (*i.e.*, the University campus at the least, the entire Primary and Secondary Impact zones at the most). Legislatively adopted development regulations that apply only in discrete institutional zones are not uncommon in general planning practice, including GMA planning jurisdictions.¹⁷

Lastly, the Board finds unavailing the Respondents’ arguments that many of the provisions of the 1998 Agreement do not address land use issues¹⁸ and that construing it to be a regulation would raise a “restraint on alienation” concern. The Board agrees that certain provisions of the 1998 Agreement do not appear to concern land use or development, however the fact remains that the City codified the **entire** 1998 Agreement into SMC 23.69.006(B) under the heading “Application of Development Regulations.” If certain aspects of the controls imposed by SMC 23.69.006(B) give rise to a University claim against the City (*e.g.*, the “restraint on alienation” issue), the City may decide, as a matter of policy, to remove the offending provision from its Municipal Code. However, legal exposure on the City’s part does not change the fact that the City made the entirety of the 1998 Agreement a development regulation by dint of codifying it into the SMC. **If the City wishes to “un-make” all or portions of this development regulation, it must do so by the same means that made it a regulation in the first place – by a GMA compliant development regulation amendment.**

To sum up, the Board agrees with Petitioners that the 1998 Agreement is a development regulation within the meaning of RCW 36.70A.030(7), and that the First Amendment wrought by Ordinance No. 121193 is therefore an amendment to a development regulation. Consequently, the Board has subject matter jurisdiction over the challenged

¹⁶ The Board notes that, by its terms, the 1998 Agreement did not “take effect” until signed by both the City and the University. Nor did the First Amendment “take effect” until it was signed by both entities in September of 2003. Finding of Fact 10. Nevertheless, this does not change the fact that the City’s unilateral adoption of Ordinance No. 120691 “placed on” the University the regulatory effect of Seattle’s development regulations. The “trigger” of the University’s signing the 1998 Agreement or Amendments thereto is no different than other regulations that “take effect” only upon the occurrence of some other event. One example is the operation of local government concurrency provisions adopted pursuant to RCW 36.70A.070(6) that are “triggered” by the submittal for a development permit application that lowers a level-of-service below a locally adopted standard.

¹⁷ In addition to the thirteen Major Institutions governed by the MIO provisions of the Seattle Municipal Code, the Board is aware of other jurisdictions that, through legislative action, have created “area-wide” zones for institutional uses. For example, the City of Kirkland has created a discrete “Planned Area 12” zone, with unique permit review and development standard requirements for Evergreen Hospital. *Salish Village v. City of Kirkland*, CPSPMHB Case No. 02-3-0022, CPSPMHB Case No. 02-3-0022, PFR filed Dec. 16, 2002. Also, the campus of Western Washington University is zoned “institutional.” *Servais, et al., v. City of Bellingham, et al.*, WWGMHB Case No. 02-2-0020, Final Decision and Order, October 26, 2000.

¹⁸ Respondents state “some of these issues [named in SMC 23.69.006(B)] may concern land use and development, but many clearly do not.” City/UW Motion to Dismiss, at 8.

Ordinance, and will dismiss the portion of the City/UW Motion to Dismiss that goes to subject matter jurisdiction.

3. Conclusions Regarding Subject Matter Jurisdiction

It is undisputed that the PFR was timely filed, therefore the Board concludes that it was timely filed pursuant to RCW 36.70A.290(2). The Board also concludes that Ordinance No. 121193 amends a GMA development regulation and that the Board has subject matter jurisdiction over the legal issues, pursuant to RCW 36.70A.280(1)(a). The portion of the City/UW Motion to Dismiss which asserts that the Board lacks subject matter jurisdiction over Ordinance No. 121193 is **dismissed**.

B. STANDING

1. Applicable Law

RCW 36.70A.280 provides in relevant part:

. . . .

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

2. Discussion

Positions of the Parties

1. City/UW

Respondents contend that Petitioners fail to establish either participation standing or APA standing. With respect to participation standing against the City, Respondents argue:

First, Petitioners have thus far failed to demonstrate that each Petitioner organization had a member or person who specifically identified himself or herself as a representative of that organization when providing oral or written comments . . . Second, Petitioner organizations have not shown

that their participation before the City “was reasonably related to the issues” they present to this Board.

City/UW Motion to Dismiss, at 9-13.

While Respondents concede that Petitioner organizations did submit written comments with respect to the lease lid and public process, none of these documents confer participation standing for the simple reason that “they never once in all of their oral and written comments ever mentioned the GMA . . . They’re absolutely silent about the GMA throughout the entire process.” Transcript, at 62.

In addition, Respondents point out that the statutory language regarding participation standing at RCW 36.70A.280(2)(b) and (4) makes no mention of state agencies. City/UW Motion to Dismiss, at 11.

Turning to APA standing, Respondents cite the standards enumerated at RCW 34.05.530 and argue that courts have interpreted these as a two-prong test: “The first and third factors require a showing of “injury in fact,” while the second requires the party to establish that the Legislature intended the [City and University] to protect [Petitioners’] interests when taking the action at issue.” City/UW Motion to Dismiss, at 11, quoting *National Elec. Contractors Ass’n v. Employment Sec. Dep’t*, 109 Wn. App.213, 219-20, 34P.3d 860 (2001). Respondents assert that Petitioners fail to meet the “injury-in-fact” test and that they fail the “zone of interest” test because their asserted “land use concerns” are misplaced. City/UW Motion to Dismiss, at 12.

2. Laurelhurst

Petitioners contend that they have participation standing under RCW 36.70A.280(2)(b) and under the *Wells*¹⁹ test recently codified by the legislature. Laurelhurst argues:

Respondents’ motion not only overstates the stringency of the standing requirement, but also fails to raise specific challenges to individual petitioners’ standing. Respondents fail to point to anything in their own records that would suggest petitioners’ participation below was insufficient. Nor do they identify which petitioners they claim do not have standing.

Petitioners’ Response to Motion to Supplement and Strike, at 19.

Petitioners then provide an extensive list of citations to dated public comments offered by Petitioner organizations. Petitioners’ Response to Motion to Supplement and Strike, at 19-31. Petitioners dispute the UW argument that the GMA makes no provision for establishing participation standing against a state agency action, and argue:

¹⁹ *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn.App.657, 670-676, 997 P.2 405 (Div. 1 2000).

Respondents' erroneous assertion that petitioners lack standing because they have not produced 'evidence' that they raised the issue of the University's compliance with the Comprehensive Plan before the City is off base. The sum and substance of petitioners comments summarized in the preceding section, leave no doubt that the petitioners' participation below was very focused on the fact that the elimination of the lease lid by the City and the University was directly inconsistent with the Comprehensive plan goals and policies listed above.

Petitioners' Response to Motion to Supplement and Strike, at 33.

Petitioners also assert that they have established APA standing, relying on the Declaration of Jeanne Hale. Petitioners' Response to Motion to Supplement and Strike, at 33-37.

Analysis

From the extensive listing of letters submitted by Petitioner organizations, it is plain that, as a practical matter, the City was definitely put on notice of the Petitioners' concerns regarding the proposal to lift the 'lease lid.' No reasonable claim can be made, therefore, that the City was 'blindsided' by the issues raised in the PFR. Had the City characterized its actions removing the lease lid as a GMA action (which it did not) the Board would have concluded that the Petitioners' PFR issues were "reasonably related" to the comments they provided below.

More fundamentally, however, the question of participation standing presumes that the public has been put on notice regarding a proposed GMA action (pursuant to RCW 36.70A.035), was encouraged to participate (pursuant to RCW 36.70A.020(11) and was afforded an opportunity for early and continuous public participation (pursuant to RCW 36.70A.130 and .140). As discussed at length, *supra*, the City itself, during the process leading up to the adoption of Ordinance No. 121193, never made mention of the GMA. In this light, the City's complaint that the Petitioners never mentioned the GMA during their comments rings particularly hollow. How would it have been possible for Petitioners to perfect their participation standing under GMA when the City assiduously avoided describing or conducting it as a GMA proceeding?

The Board rejects Respondents' argument that the Petitioners lack GMA participation standing because the City, in the first instance, failed to undertake a GMA proceeding to which such standing could attach. To reward the City for this failing by denying participation standing to Petitioners would be manifestly unjust and fly in the face of RCW 36.70A.020(11). The Board finds that Petitioners have participation standing to bring their claims before the Board.

3. Conclusions Regarding Standing

The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The portion of the City/UW Motion to Dismiss that challenges standing, based on alleged lack of participation by Petitioners, is **dismissed**. Because the Board concludes that Petitioners have established participation standing, it need not and does not reach the portion of the City/UW Motion to Dismiss that challenges the alleged failure of Petitioners to meet the standing requirements of RCW 34.05.530.

VII. LEGAL ISSUES

A. PUBLIC NOTICE AND PUBLIC PARTICIPATION

Legal Issue No. 1

Does the amendment of the 1998 Agreement to eliminate the restrictions on leasing in the primary and secondary impact areas and to eliminate the requirement that such amendment be processed by the City and University as a Master Plan Major Amendment violate the GMA public participation goals and requirements, including RCW 36.70A.020(11), 36.70A.035, 36.70A.130, and 36.70A.140, in that the City University Community Advisory Committee (CUCAC) and other community groups (petitioners here) were precluded from meaningfully reviewing and commenting on the proposal and the various alternatives considered by the City Council and by the University?

Legal Issue No. 2

Does the amendment of the 1998 Agreement violate the GMA public participation goals and requirements, including RCW 36.70A.020(11), 36.70A.035, 36.70A.130, and 36.70A.140, in that these material changes to the 1998 Agreement leasing and acquisition policies were not adequately disclosed or analyzed prior to the City Council's vote to adopt Ordinance No. 121193 and prior to action by the University?

1. Applicable Law

RCW 36.70A.020(11) provides:

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.035 provides in relevant part:

(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to

property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

- (a) Posting the property for site-specific proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
- (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
- (e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

....

RCW 36.70A.130 provides:

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section. A county or city not planning under RCW 36.70A.040 shall take action to review and, if needed, revise its policies and development regulations regarding critical areas and natural resource lands adopted according to this chapter to ensure these policies and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section. Legislative action means the adoption of a resolution or Ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore. The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area Ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

(b) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section . . .

....

RCW 36.70A.140 provides in relevant part:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments . . .

2. Discussion

Positions of the Parties

Petitioners assert the City and University failed to provide early and continuous public participation in the amendment process as specified in goal RCW 36.70A.020(11). Petitioners' PHB, at 26. Petitioners state the City and University elected to amend the 1998 Agreement, and eliminate the amendment process, rather than engage in a meaningful dialogue with the affected neighborhoods and CUCAC. *Id.*, at 30. The Petitioners provided the text from the 1994 Comprehensive Plan, which contains the policies for public participation in reviewing Plan amendments and the development regulations implementing the Plan:

L-265

Encourage significant community involvement in the development, monitoring, implementation and amendment of major institution master plans, including the establishment of citizen's advisory committees containing community and major institution representatives;

L-266

Encourage Advisory Committee participation throughout the process of revision, amendment and refinement of the master plan proposal;

L-267

Require preparation of either a master plan or a revision to the appropriate existing master plan when a major development is proposed that is part of a major institution, and does not conform with the underlying zoning and is not included in an existing master plan;

N-19

Support neighborhood plan stewardship with the goal of promoting continued cooperation between the City and local neighborhoods in implementing adopted neighborhood plan goals and policies, carrying out neighborhood plan work activities and implementing the Comprehensive Plan.

Id., at 27-28.

Petitioners assert that the 1998 Agreement was negotiated with substantial input from the communities and complied with the policies listed above. *Id.*, at 30. In addition, “the lease lid would be retained in the new Campus Master Plan when it was adopted, and that ‘any change to these limitations shall be proposed as a major amendment to the Master Plan.’” *Id.*, at 28. Petitioners then provided the text from the 1998 Agreement and the Master Plan major amendment process arguing the process provided for “significant community” and “Advisory Committee” involvement in any proposed alterations to the lease lid. *Id.*, at 29.

In addition, Petitioners assert the public received inadequate notice of and opportunity to participate in the alternatives being considered by the City Council. *Id.*, at 30-32. The Petitioner’s assert the City did not provide public notice after its initial March 28, 2003, announcement notifying a public hearing for April 10, 2003. *Id.*, at 31. Petitioners state the “proposed amendment was revised several times in the final weeks before the City adopted the amendment,” and that RCW 36.70A.035 “mandates the City’s presentation for public review and comment any revisions to the amendments being considered by the Council.” *Id.*, at 31. They also claim that although some community representatives obtained some copies of the various proposed alternatives, it was not sufficient to comply with the GMA public process. *Id.*

City/UW

The City/UW stated, “[a]s part of the public process, the City and the University provided multiple opportunities for public comment, including multiple public meetings with interested groups, a public hearing, and public forum” before the Council decided to remove the lease lid limit in the First Amendment to the 1998 Agreement.” Respondent’s PHB, at 7. However, Respondents assert that no GMA “provisions apply to the decision to lift the lease lid because that decision did not entail an amendment of a development regulation.” *Id.*, at 8. This issue was addressed Section VI, *supra*, and the Board dismissed the motion. The Board concluded that Ordinance No. 121193 amends a

GMA development regulation, and that the Board has subject matter jurisdiction over the legal issues, pursuant to RCW 36.70A.280(1)(a).

In the alternative, the Respondents state that even if the Amendment to the lease lid was a development regulation it did not violate GMA public participation. *Id.* The “Petitioners and the public had reasonable notice of the proposed policy change, and many early and continuous opportunities to voice their disagreement with the proposed change.” *Id.* In addition, Respondents provide a list of general public notices provided by news releases and notices of public hearings, the Council’s notice of Weekly Schedule Highlights and Council agendas to support its claim that notice was provided. *Id.*, at 14. Respondents claim “interested citizens and organizations commented regarding the proposed legislation, and those comments affected the content of the legislation that was ultimately adopted,” and that “[t]he City provided reasonable notice regarding the proposed lease lid action.” *Id.*, at 16-17.

Analysis

Laurelhurst argues that the City has violated the public participation goal of the GMA set forth at RCW 36.70A.020(11), the public notice requirements of RCW 36.70A.035, and the public participation requirements of RCW 36.70A.035, .130 and .140. In rebutting these allegations, the City’s initial and primary defense is the jurisdictional attack the Board has rejected *supra* – namely, that the City was under no statutory duty to do so because the adoption of Ordinance No. 121193 was not a GMA action.

Alternatively, the City argues that it did, in fact, give notice and make provision for public participation, albeit non-GMA notice and non-GMA public participation, and that the Petitioners’ complaints are therefore simply policy disagreements about the method or timing of public review of Ordinance No. 121193²⁰. Implicit in this line of defense is that whatever level of notice and public participation is required by the GMA, the City effectively provided it.

Having concluded, *supra*, that the amendment to the 1998 Agreement constituted an amendment to a GMA development regulation, the Board now rejects the City/UW position that Ordinance No. 121193 can have lawfully been adopted by a non-GMA process. As the Board stated in a previous case involving the City of Seattle:

[T]he Board holds, in the Central Puget Sound region, comprehensive land use planning is now done exclusively under Chapter 36.70A RCW – the Growth Management Act.

West Seattle Defense Fund v. City of Seattle, CPSGMHB Case No. 96-3-0033, Final Decision and Order (March 24, 1997), at 11. Footnote omitted.

²⁰ The Board notes that Ordinance No. 121193 not only eliminated the lease-lid, but also eliminated the provision that required any changes to the lease-lid to be addressed through the major amendment process for the Campus Master Plan. The Board was unable to find any reference in the limited notices or announcements in the Record that advised the public that this avenue for addressing the lease-lid was being eliminated.

The Board continues to stand by this holding as the law in this region. Why does it matter, as a matter of public policy, that a development regulation must be adopted, and likewise amended, subject to the public participation goal and requirements of the GMA? Absent a GMA process, the public is not entitled as a matter of law to “notice procedures that are reasonably calculated to provide notice to . . . affected and interested individuals” (RCW 36.70A.035); elected officials are not obliged to be “guided by” (*i.e.*, to consider) the Act’s planning goals (RCW 36.70A.020, (preamble)), including the goal to “encourage the involvement of citizens in the planning process” (RCW 36.70A.020(11); nor are they required to provide for “broad dissemination of proposals and alternatives” while engaging the public in “early and continuous participation” in the development (RCW 36.70A.140) and amendment (RCW 36.70A.130) of plans and regulations. In short, as the Board has previously observed:

To inappropriately truncate or eliminate the public’s opportunity to participate in the making of local government policy would fly in the face of one of the Act’s most cherished planning goals and separate the “bottom up” component of GMA planning from its true roots – the people.

McVittie (V) v. Snohomish County, CPSGMHB Case No. 00-3-0016, Final Decision and Order (Apr. 12, 2001), at 14 .

The City conceded, on the record, that the adoption of Ordinance No. 121193 was not adopted under the authority of nor pursuant to the requirements of RCW 36.70A. Transcript, at 20. The only record facts before the Board support a conclusion that the City failed to give notice in compliance with RCW 36.70A.035, failed to “encourage the involvement of citizens in the [GMA] planning process” in compliance with RCW 36.70A.020(11), failed to “broadly disseminate proposals and alternatives,” and failed to provide the public with an opportunity for “early and continuous participation” as required by RCW 36.70A.130 and RCW 36.70A.140. For these reasons, the Board finds that Petitioners have carried the burden of proof in showing that the City’s action adopting Ordinance No. 121193 was **clearly erroneous**. The Board will remand the Ordinance to the City with direction to take legislative action to bring it into compliance with the goals and requirements of the GMA.

The Board expresses no opinion regarding the advisability of the City’s decision to incorporate the 1998 Agreement into SMC 23.69.006(B), nor the advisability of specific provisions regarding off-campus leasing or acquisition. Inclusion into the City’s Code of language addressing the subject matter of the 1998 Agreement is something within the City’s sole discretion; it is neither mandated by nor prohibited by GMA. However, if and when the City exercises that discretion, it is obliged to do so under the authority of and subject to the requirements of the Act.

3. Conclusions re: Legal Issues 1 and 2

The Board concludes that the Petitioners have carried the burden of proof to show that Seattle Ordinance No. 121193 **failed to be guided by and did not substantively comply**

with RCW 36.70A.020(11) and that it **failed to comply** with RCW 36.70A.035, .130, and .140. The Board will **remand** Ordinance No. 121193 to the City with direction to take legislative action to bring it into compliance with the goals and requirements of the Act.

B. OTHER ISSUES

Legal Issue No. 3

Does the amendment of the 1998 Agreement violate RCW 36.70A.070 and RCW 36.70A.130, requiring internal consistency between comprehensive plan goals and policies and other GMA planning documents, because the amendment is inconsistent with goals and policies in the Seattle Comprehensive Plan, respecting Major Institutions, Housing, Neighborhood Planning, and Transportation, including but not limited to: (a) Major Institution goals LG79, and LG81, and Major Institution policies L262, L263, L264, L265, L266, L267, L269, L270, L275, L280, L282, L285, and L288, which embody the Major Institution planning principle of allowing institutional flexibility within the overlay in exchange for a clear line of demarcation (boundary) to prevent institutional sprawl from adversely affecting surrounding neighborhoods; (b) Neighborhood Planning Goals NG1, NG2, NG5, and NG6 and Neighborhood Planning Policies N1, N2, N4, N5, N6, N7, N9 and N19, and any previously-adopted Neighborhood Plans (Subarea Plans) for those neighborhoods whose boundaries include portions of the University's primary or secondary impact areas; and (c) Housing Goals H10 and H11, reflecting the City's recognized need to accommodate unmet housing demands in urban villages and urban centers?

Legal Issue No. 4

Does the amendment of the 1998 Agreement violate RCW 36.70A.103, requiring that state agencies comply with local comprehensive plans, in that the amendment is not consistent with relevant goals and policies in the Seattle Comprehensive Plan as described in Paragraph 5.1.c [of the PFR]?

The Board has determined, *supra*, that Seattle has violated the public participation goals and requirements of the GMA, and remanded Ordinance No. 121193, to the City for further proceedings in compliance with the GMA's provisions. It is possible that, on remand, the substance of the challenged Ordinance could change. Therefore, the Board need not and, in the interests of judicial economy, will not, address either Legal Issues 3 or 4.

VIII. INVALIDITY

1. Applicable Law

RCW 36.70A.302 provides in relevant part:

- (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

- (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
- (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter . . .

2. Discussion

With respect to noncompliance alleged in Legal Issues 1 and 2, *supra*, the Petitioners have carried the burden of proof to show that Seattle Ordinance No. 121193 failed to be guided by and did not substantively comply with RCW 36.70A.020(11) and that it failed to comply with the requirements of RCW 36.70A.035, .130, and .140. The Board has remanded the Ordinance for the City to amend it to bring it into compliance with the goals and requirements of the Act. The Petitioners requested that the Board enter a finding of invalidity. The Board agrees that the City missed the fundamental and indispensable steps of public notice and public participation, however, no evidence or argument was made that there is any risk of inappropriate vesting during the period of remand. Therefore, the Board declines to enter a finding of invalidity.

3. Conclusions Regarding Invalidity

The Board has found Seattle's adoption of Ordinance No. 121193 **noncompliant** with RCW 36.70A.020(11), .035, .130 and .140. The Board does not find a compelling reason to invalidate the Ordinance during the period of remand.

IX. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. With respect to adoption of Ordinance No. 121193, the Board issues the City of Seattle a **finding of noncompliance** with RCW 36.70A.020(11), .035, .130, and .140.
2. The Board establishes **4:00 p.m. on August 30, 2004** as the deadline for the City of Seattle to take appropriate legislative action to achieve compliance with the goals and requirements of the GMA as interpreted and set forth in this Order.
3. By **Monday, September 6, 2004, at 4:00 p.m.**, or within one week of taking the legislative action described in paragraph 2 above, whichever comes first, the City shall submit to the Board, with a copy simultaneously served on Petitioners, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

4. By **Monday, September 13, 2004, at 4:00 p.m.**, or within two weeks of receiving the SATC, whichever comes first, the Petitioners shall submit to the Board, with a copy simultaneously served on opposing counsel, an original and four copies of any Response to the SATC.
5. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **Monday, September 20, 2004**. The Compliance Hearing will be held at the Board's offices at 900 Fourth Avenue, Suite 2470, in Seattle, WA. In the event that the City takes legislative action earlier than the date established in paragraph 2 above, the Board will issue a subsequent Order setting the revised date for Compliance Hearing.

So ORDERED this 3rd day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

APPENDIX A – DISPOSITION OF CITY/UW PROPOSED SUPPLEMENTAL EXHIBITS

Following is a description of the seventeen proposed supplemental exhibits that were attached to the City/UW Motion to Supplement and Strike.

	Description of exhibit	
C/UW Supp. 1	“Ave Revitalization Plan”	Not in Index Motion to Supplement is Denied
C/UW Supp. 2	City of Seattle News Advisory, Councilmember Jan Drago Tours the Ave.” (Feb 12, 2003)	Added to Index
C/UW Supp. 3	Inside Scoop from Councilmember Jan Drago – February 2003	Added to Index
C/UW Supp. 4	Seattle City Council Weekly Schedule Highlights: “Coming Up: UW Lease Lid, “Missing Link” and “Dangerous Dogs” (Mar. 28, 2003)	Added to Index
C/UW Supp. 5	Agenda, Seattle City Council Committee of the Whole (Mar. 31, 2003)	Added to Index
C/UW Supp. 6	Seattle City Council Public Hearing on Council Bills 114495 and 114491, University District Lease Lid and Noise Ordinance No. Changes.	Added to Index
C/UW Supp. 7	Agenda, Seattle City Council, Finance, Budget, and Labor Committee (Apr. 2, 2003)	Added to Index
C/UW Supp. 8	Seattle City Council, Weekly Schedule Highlights, “Coming Up: OPARB Update, UW Lease Lid and Noise Ordinance No. Hearings” (Apr. 4, 2003)	Added to Index
C/UW Supp. 9	Seattle City Council, Weekly Schedule Highlights, “Coming Up: Burke-Gilman Trail Vote, Revenue Forecast, Lease Lid Committee Vote and Northgate, High Point Cows” (Apr. 11, 2003)	Added to Index
C/UW Supp. 10	Agenda, Seattle City Council, Finance, Budget, Business and Labor Committee (Apr. 16, 2003)	Added to Index
C/UW Supp. 11	Seattle City Council, Weekly Schedule Highlights, “Coming Up: Dangerous Dogs Hearing, Lease Lid Vote, Viaduct and King Street Transit HUB Design Charette” (May 2, 2003)	Added to Index
C/UW Supp. 12	Seattle City Council News Release, “Council Committee Passes Framework for Lifting UW Lease Lid, But Not Yet in Agreement on Specifics” (May 29, 2003)	Added to Index
C/UW Supp. 13	Agenda, Seattle City Council, Finance, Budget, Business and Labor Committee (May 29, 2003)	Added to Index
C/UW Supp. 14	Seattle City Council News Release, “Council Committee Approves UW Lease Lid Lift (Jun. 4, 2003)	Added to Index

C/UW Supp. 15	Agenda, Seattle City Council, Finance, Budget, Business, and Labor Committee (Jun. 4, 2003)	Added to Index
C/UW Supp. 16	Agenda, Seattle City Council, Joint Finance, Budget Business and Labor/Land Use Committees (Jun. 16, 2003)	Added to Index
C/UW Supp. 17	Doherty Declaration and Attachment (Jan. 8, 2004)	Not in Index Motion to Supplement is Denied